

## DISSENTING VIEWS OF COMMISSIONER JENNIFER A. HILLMAN

These views respond to a decision of a NAFTA panel remanding portions of the Commission's affirmative determination concerning hard red spring (HRS) wheat from Canada for further consideration. In response to the panel's decision, the Commission re-opened the record to gather certain additional information, and offered parties an opportunity to comment on the revised record.

As explained below, on remand I again determine that the domestic industry is materially injured by reason of subsidized and less-than-fair-value imports of HRS wheat from Canada. I address each of the issues identified by the Panel. Except as modified below, I re-adopt all of the findings of the Commission's original determination.

### A. Post-petition information<sup>1</sup>

In the original determination, the Commission found that subject imports increased from 41 million bushels in marketing year 2000/2001 to 46 million bushels in marketing year 2001/2002, and then dropped off sharply to only 11 million bushels in marketing year 2002/2003.<sup>2</sup> The Commission found that the increase in subject import volume from 2000/01 to 2001/02 was significant, but determined to give less weight to the subsequent decline in 2002/03 because it appeared to have been caused in large part by the September 13, 2002 filing of the petition requesting initiation of the current investigations.

In deciding that the petition had suppressed subject import volumes, the Commission relied primarily on the following record information: (1) subject imports fell off sharply in October 2002, the month following the filing of the petition, and thereafter were at minor levels; (2) certain large purchasers specifically cited the investigation as a reason why their purchases of imports from Canada fell; and (3) the percentage decrease in subject imports was \*\*\* the percentage decrease in exports from Canada to other world markets (\*\*\* percent versus \*\*\* percent).<sup>3</sup>

The Panel does not take issue with the Commission's decision to give less weight to the data on subject import volume in 2002/03. However, the Panel remanded two issues with regard to post-petition information to the Commission for further consideration. First, the Panel found that the Commission had not adequately shown that the filing of the petition had had an effect on the price effects of the subject imports, separate from the effects on subject import volume. Second, the Panel found that the Commission had not adequately demonstrated how it had given the post-petition information at least *some* weight, albeit reduced weight, in its analysis.

With regard to the first issue, it appears that the Panel's instructions are premised on an incorrect interpretation of the statute. I will not delve deeply into this issue here. Suffice it to say that the Commission spoke clearly on this issue in its recent decision on remand in *Wire Rod from Canada*. There

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<sup>1</sup> This section responds to issues 1 and 2 remanded by the Panel. Panel Report at 65.

<sup>2</sup> Commission Determination at 61. Marketing years for HRS wheat run from June 1 in one year to May 31 in the following year.

<sup>3</sup> Commission Determination at 63. The ability of the petition to have a strong impact on subject imports is facilitated by the status of the Canadian Wheat Board (CWB) as the only seller of Canadian produced HRS wheat. Unlike some industries involving multiple suppliers, the CWB's decision on where to direct its product in response to events (including the filing of the petition in this case) will quickly and uniformly determine overall trade flows of Canadian HRS wheat.

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the Commission stated that it disagreed with the view that the statute “requires us to consider separately whether significant changes in all three statutory factors (volume, price effects, and impact) are related to the pendency of the investigation in order to discount, respectively, volume data, price effects data, and impact data. The statute only states that the Commission must consider whether there has been ‘any change in the volume, price effects or impact of imports of the subject merchandise’ since the filing of the petition, not a change with respect to each factor.”<sup>4</sup>

Thus, having determined that the subject import volumes were suppressed by the filing of the petition, the Commission was entitled to reduce the weight given to post-petition information generally, including information on price effects. Especially in cases such as this one involving a highly-substitutable commodity product, subject import volume and price effects are frequently closely intertwined. The drop in subject import volume after the petition was filed was so substantial that questionnaire respondents reported no pricing data for subject imports from September 2002 onwards.

Although I disagree with the Panel’s legal interpretation, I will proceed to address the information cited by the Panel as undercutting a finding that the filing of the petition affected the price effects of subject imports. The Commission specifically addressed the issue of the effect of the petition on prices in its original determination. There it noted that farm prices increased substantially from August 2002 (prior to the filing of the petition) to October 2002 (after the filing of the petition), and then declined somewhat but remained at levels above levels of comparable months in 2001. The Commission observed that the fact that prices peaked in the month just after filing was evidence of the effects of the petition itself.<sup>5</sup>

The Panel claims that the data show substantial increases in U.S. prices in August and September 2002, but little or no increase in October 2002.<sup>6</sup> However, the Panel appears to be referring to a different set of pricing data than the set relied upon by the Commission in its opinion. The Commission cited monthly farm price data reported by USDA, whereas the Panel examined data on downstream purchases by millers from grain elevators and grain trading companies. No party challenged the Commission’s use of the farm price data. It is not clear why the Panel chose to examine data that were not relied upon by the Commission in making its determination. The USDA data show a 3.9 percent increase in prices from September to October 2002, compared to a 0.5 percent increase in the data cited by the Panel.<sup>7</sup>

I continue to find that the increase in farm prices from August 2002 to October 2002 is evidence of the effects of the petition. It is true that prices increased from June 2002 to August 2002 as well. This was prior to the filing of the petition, and may well have been the result of other factors such as news regarding the effects of drought conditions in Canada and the United States. The fact that other factors also affected prices does not mean that the filing of the petition did not have an important effect.

The Panel also faults the Commission for not addressing the fact that prices declined in the six months after October 2002, even in the absence of substantial imports from Canada.<sup>8</sup> In fact the

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<sup>4</sup> *Carbon and Certain Alloy Steel Wire Rod from Canada*, Inv. No. 731-TA-954 (Final) (Remand), USITC Pub. 3730 (Oct. 2004) at 6 (footnotes omitted) (emphasis in original).

<sup>5</sup> Commission Determination at 69.

<sup>6</sup> Panel Report at 20.

<sup>7</sup> *Compare* First Staff Work Papers, Oct. 2, 2003, Table C, *with* Panel Report at 20. The 0.5 percent increase was for No. 1 HRS. The Panel observed that prices for No. 2 HRS actually declined 4.1 percent from September to October 2002.

<sup>8</sup> Panel Report at 22.

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Commission explicitly considered data after October 2002, observing that in the three months after the filing of the petition, prices remained well above prices in comparable months in 2001, when imports were still present in substantial quantities.<sup>9</sup> Thus the Commission addressed post-petition pricing trends, making clear its view that price levels in the latter part of 2002 were elevated from the previous year due, in part, to the absence of Canadian imports suppressing prices.

The second issue on post-petition data remanded by the Panel was for the Commission to clarify the manner in which it placed at least *some* reliance upon the post-petition information. The Panel indicated that, while the Commission could in an appropriate case choose to give no weight to post-petition data, this was not such a case given that the Commission acknowledged that drought conditions also had an effect on the volume and price effects of subject imports during a period that overlapped the filing of the petition.<sup>10</sup>

I note that the statute authorizes the Commission to give “less weight” to the post-petition information once it finds that the investigation has had the requisite effects. The statute does not require the Commission to specify precisely the quantum of reliance it has placed on the post-petition information as compared to information pertaining to prior periods. Nor am I aware of prior investigations in which the Commission has sought to do so.

Having said that, I do agree with the Panel that in a case such as this one in which another factor – in this case drought in Canada and the United States – has also had the effect of dampening import volume and raising prices in the post-petition period, it is appropriate not to completely discount the post-petition information. Accordingly, I have given the post-petition volume some weight in my analysis. This information shows lower subject import volumes and higher U.S. prices for HRS wheat, which would tend to support a negative determination. However, because I give this information substantially reduced weight (for the reasons described here and in the original Commission views), I do not find that the post-petition information is sufficient to outweigh the pre-petition information in the record indicating significant subject import volume and significant price effects caused by the subject imports.

### **B. Price effects<sup>11</sup>**

The circumstances of the HRS wheat market make evaluating the relative prices of U.S. and Canadian product challenging. U.S. farmers generally sell their wheat to grain elevators, who then typically resell to domestic mills or grain trading firms. Trading firms may either resell their product to U.S. mills, or export it. The Canadian Wheat Board (CWB) generally does not sell to elevators, but rather sells to mills and trading firms. Thus competition between subject imports and U.S. HRS wheat takes place at a level downstream from U.S. farmers. Other issues such as transportation costs and protein content can also affect the comparability of price data.

In the original investigation, the Commission went to great lengths to gather pricing data that reflected the level of actual competition between subject imports and domestic HRS wheat. In addition to monthly data from purchasers and importers of HRS wheat, the Commission compared prices of U.S. and

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<sup>9</sup> Commission Determination at 69.

<sup>10</sup> Panel Report at 25.

<sup>11</sup> This section addresses points 3, 4, 6, 7, 8 and 9 remanded by the Panel. Panel Report at 65-67.

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Canadian HRS wheat purchased by individual large purchasers as well as those made on the basis of a Minneapolis delivery.<sup>12</sup>

The pattern of relative prices of U.S. and Canadian product varied somewhat by product, and by whether it was company-specific or place-specific, but generally showed underselling by the subject imports in approximately one-half of comparisons. For a highly price-sensitive commodity product, we found this frequency of underselling to be significant. We also considered a further statistical analysis that sought to control for other factors, such as protein content, dockage and weight. We found that the results of this analysis were not inconsistent with a finding of significant underselling.<sup>13</sup>

The Panel affirmed our conclusion that underselling was significant in this market, recognizing that the Commission has significant discretion in evaluating the weight and significance of the evidence before it.<sup>14</sup> However, the Panel remanded several issues related to the Commission's data and analysis of underselling.

First, the Panel questioned whether the Commission had adequately ensured that price comparisons were at the same level of trade. The Panel observed that traders who buy U.S. wheat may subsequently compete with subject imports for sales further downstream. Thus, the Panel stated, sales by elevators to trading companies may not reflect the same level of trade as sales of subject imports to mills.<sup>15</sup> The Panel ordered the Commission to ensure that its data did reflect sales at the same level of trade. Second, the Panel ordered the Commission to address the extent to which price changes at the level of grain elevators were transmitted to farmers, who constitute the domestic industry.<sup>16</sup>

*Same level of trade*

In response to these concerns, the Commission re-opened the record to gather additional information concerning prices. The Commission clarified that the purchaser data was exclusively from mills and did not include purchases by trading companies. The Commission also discovered that some of the data involved sales between related parties. Consistent with prior practice, the Commission excluded those sales from our data set since they do not necessarily reflect transactions at market prices.<sup>17</sup> Thus the revised data resolve the concerns identified by the Panel over whether the pricing data reflects prices at the same level of trade. The Commission also obtained information from grain elevators and traders on the extent to which they transmit to their upstream suppliers the price changes they receive from their customers.

The revised pricing data show a slightly greater frequency of underselling than the data used in the original determination. Using combined elevator/trader sales to mills, there was underselling in 64 percent of observations.<sup>18</sup> In light of this revised data, I continue to find that underselling by subject imports of HRS wheat was significant. A statistical analysis controlling for protein content, dockage, and

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<sup>12</sup> Original Staff Report at Tables V-6, V-7, V-12, V-13, V-14, V-15.

<sup>13</sup> Commission Determination at 67 and n.350.

<sup>14</sup> Panel Report at 37-38.

<sup>15</sup> Panel Report at 49-50.

<sup>16</sup> Panel Report at 66.

<sup>17</sup> Remand Staff Report at III-9.

<sup>18</sup> Calculated from Remand Staff Report, Tables III-4 through III-7.

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weight produced similar results as in the original determination, and thus is not inconsistent with a finding of significant underselling.<sup>19</sup>

### *Pass-through of price changes to farmers*

On the issue of pass-through of price changes from downstream sellers to farmers, most grain elevator associations stated that price changes received by elevators on their sales are passed back to farmers.<sup>20</sup> Similarly, the prevailing view of grain trading firms was that the competitiveness of the wheat market results in price changes being transmitted quickly and fully to their suppliers. This confirms that underselling at the level of purchases by mills is significant with respect to the farmers that produce the like product, and very quickly results in lower prices to the farmers.

### *Role of underselling*

The Panel also ordered the Commission to clarify what role underselling had in its findings of significant price depression and adverse impact.<sup>21</sup> For a highly-substitutable product, one would expect underselling to facilitate growth in import volume. This growth of imports, at relatively low prices, would naturally be expected to place downward pressure on wheat prices in the U.S. market.<sup>22</sup>

The link between changes in subject import volume and U.S. wheat prices can be seen from the pricing data. As the Commission observed in the original determination, there is an inverse correlation between the volume of subject imports and farm prices when the data are examined on a yearly or monthly basis. On a yearly basis, the average farm price fell from \$2.94 per bushel in 2000/01 to \$2.89 per bushel in 2001/02, as subject imports grew 11 percent from 41 million bushels to 46 million bushels, and increased their share of the U.S. market. On a monthly basis, for example, over the five-month period November through March, farm prices were lower, and subject imports higher, in 2001/02, as compared to the corresponding month in 2000/01.<sup>23</sup> Thus, the data demonstrate that Canadian HRS wheat, which was underselling U.S. wheat to a significant degree, gained sales and market share in the U.S. market, while U.S. prices were declining as a result of price pressure from Canadian HRS wheat.

Indeed, in my view, the evidence also supports a conclusion of significant price *suppression* in addition to price depression. As the Commission found in the original determination, the financial performance of farmers deteriorated substantially from 2000 to 2001. In addition to lower per-unit returns, the data show that rising costs between 2000 and 2001 were a substantial factor in lower overall farmer returns. The variance analysis generated by the Commission for purposes of this remand

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<sup>19</sup> Remand Staff Report at III-18 through III-20.

<sup>20</sup> Remand Staff Report at II-5, II-6.

<sup>21</sup> Panel Report at 38.

<sup>22</sup> In many markets, the effects of low-priced offers for subject imports can be seen directly, albeit anecdotally, through confirmed instances in which domestic producers lost sales or had to lower their prices in the face of import competition. As the Commission noted, one would not expect to see specific instances of lost sales and revenues in a commodity market such as the market for HRS wheat. Rather, the effects of underselling can be inferred.

<sup>23</sup> First Staff Work Papers, Tables A & C.

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illustrates this effect.<sup>24</sup> Thus, at the same time that domestic producers were experiencing lower per-unit returns, they were being squeezed by higher costs. Thus the rising volume of subject imports had doubly damaging effects, by keeping prices low at a time of rising farmer costs.

#### *Competition in third-country markets*

The Panel also faulted the Commission for not analyzing the effects of competition in third-country markets on domestic producers: “Just as downstream competition in the U.S. domestic market might be linked to upstream injury to U.S. farmers, so too could downstream competition in third-country markets be linked to the same upstream injury.”<sup>25</sup>

The Commission’s remand staff report presents data on exports from the United States to third country markets. Total U.S. exports of HRS wheat decreased from 227 million bushels in 2000/01 to 216 million bushels in 2001/02, then increased to 254 million bushels in 2002/03. As a share of U.S. HRS production, exports were 45 percent in both 2000/01 and 2001/02, and then grew substantially to 71 percent in 2002/03.<sup>26</sup> The share of U.S. production that is exported is high enough so that developments with respect to the export trade can have a significant effect on the fortunes of the U.S. industry.

However, there is nothing in the data to indicate that competition in export markets explain the injury experienced by the domestic industry. As noted, the injury is most apparent in examining trade data pertaining to 2001/02 and financial data pertaining to 2001, as compared to the immediately preceding marketing and calendar years. Between 2000/01 and 2001/02, U.S. exports remained at a constant 45 percent of domestic production. Moreover, the unit value of these export sales increased from 2000/01 to 2001/02.<sup>27</sup> This is in contrast to falling HRS wheat prices in the U.S. market. Thus the situation with respect to U.S. exports of HRS wheat did not change in an appreciably negative way so as to account for any of the declining trends in domestic industry indicators in 2001/02 and calendar year 2001.<sup>28</sup>

#### *Role of the Minneapolis Grain Exchange (MGE)*

The Panel also faulted the Commission for what it views as an incomplete analysis of the role of the Minneapolis Grain Exchange (MGE) in establishing U.S. HRS wheat prices. Specifically, the Panel ordered the Commission to “[a]nalyze and explain how average farm prices for HRS wheat are based on the outcome of downstream transactions, and subject imports are large enough to impact HRS wheat

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<sup>24</sup> Remand Staff Report at Appendix C. For several of the sets of farmer data, rising costs in 2001 had an even greater negative impact on overall returns than falling prices. Tables C-1D, C-1E.

<sup>25</sup> Panel Report at 52.

<sup>26</sup> Remand Staff Report at Table II-3.

<sup>27</sup> USDA data, at Exhibit 6 of Petitioner’s Remand Comments (exports were \$3.46 per bushel in 2000/01, and \$3.61 per bushel in 2001/02).

<sup>28</sup> While the U.S. industry’s reliance on export sales grew substantially in 2002/03, as described above I have given data pertaining to this period substantially less weight in my analysis given the effects of the filing of the petition. In any event, industry financial performance was substantially improved in 2002 as compared to 2001.

*Public Version*

prices on the futures market of the MGE, specifically taking into account the proprietary information found at page 56 of the CWB's brief."<sup>29</sup>

In the original determination, the Commission explicitly set out its views of the factors that influence U.S. market prices for HRS wheat:

Prices for HRS wheat are influenced by both global and local factors. Changes in global supply and demand affect prices worldwide, as demonstrated by the fact that prices for HRS wheat at different locations in the world tend to fluctuate in tandem. Local factors also influence prices of HRS wheat, as a result of changes in local supply and demand, which changes are independent of global trends. The trade-limiting effect of transportation costs results in "location economics," with the result that HRS wheat flows to the best market with the least transportation cost. Events affecting supply and demand in local markets, therefore, cause local HRS wheat prices to change relative to prices in other markets around the world.<sup>30</sup>

As the Commission stated, both global and local factors affect wheat prices in the United States. Local factors play an important role for the simple reason that wheat has a relatively low value-to-weight ratio. The cost of transporting it can therefore be significant relative to the price that can be obtained for it. In the original determination the Commission cited various record sources that demonstrate the importance of local factors.

The additional information gathered in this remand further bolsters the support for the significance of local factors, including local supply, in setting the price for HRS wheat. All responding grain traders, and most responding elevator associations, agreed that wheat prices were affected by "supply and demand in a region served by a local grain elevator or group of elevators."<sup>31</sup> It stands to reason that the number of wheat suppliers offering product to a purchaser at a particular time and delivery location would tend to impact the prices that the purchaser can obtain.

In the U.S. market, the MGE plays a key role in price discovery. As the Commission indicated in the original determination, the MGE is the primary source of information regarding prices of HRS wheat, and has a cash market, futures markets, and an options market.<sup>32</sup> Grain elevators and traders generally use MGE prices as a reference in setting the prices they pay for HRS wheat.<sup>33</sup> While prices in the MGE markets typically serve as a starting point, other factors play a role in setting the actual price for a particular transaction in a particular location. These include quality, protein-content, transportation, timing, as well as "supply and demand conditions at locations closer to the ultimate consumer."<sup>34</sup> The

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<sup>29</sup> Panel Report at 66-67. One Panelist dissented from the Panel's decision to remand on this issue. Panel Report at 62 n.158.

<sup>30</sup> Commission Determination at 65 n.338.

<sup>31</sup> Remand Staff Report at Table II-2.

<sup>32</sup> Commission Determination at 33.

<sup>33</sup> Remand Staff Report at II-6 to II-8.

<sup>34</sup> See Remand Staff Report at II-11.

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difference between MGE and local cash prices is known as the “basis” and it can vary over time and by location.

With respect to the effect of subject imports on MGE wheat prices themselves, the Panel has asked the Commission to address whether “subject imports are large enough to impact HRS wheat prices on the futures market of the MGE, specifically taking into account the proprietary information found at page 56 of the CWB’s brief.”<sup>35</sup> The Panel was referring to comments by \*\*\* to the effect that Canadian wheat exports to the United States were insignificant because those exports accounted for only one percent of the total wheat trades at the MGE.<sup>36</sup> However, this fact alone does not mean that Canadian product does not affect MGE prices. The futures trade at the MGE is so large that it dwarfs even U.S. wheat production, which presumably affects MGE prices. MGE prices appear to be influenced by various, generally global, factors of supply and demand. On the supply side, important factors appear to be production and inventory of the world’s large wheat-producing regions, including Canada and the United States.<sup>37</sup>

It is less easy to establish that exports of HRS wheat from Canada to the United States specifically, as opposed to Canadian production of HRS wheat generally, influence MGE prices.<sup>38</sup> Exports to the United States represented roughly \*\*\* percent of total Canadian shipments of HRS wheat in the two marketing years prior to the filing of the petition.<sup>39</sup> Thus, these exports represented an important portion of the overall Canadian supply of HRS wheat, and as such, accounted for a portion of the impact of Canadian supply on MGE prices for HRS wheat.<sup>40</sup>

While I find that subject imports probably had some effect on MGE futures prices, I have relied mainly on the fact that U.S. HRS wheat prices are ultimately determined by a number of factors, including local supply and demand, and that MGE prices are merely a starting reference point, albeit an important one. This means that the role of the MGE futures markets does not insulate prices in the U.S. HRS wheat market from the price effects of subject imports.

### **C. Impact<sup>41</sup>**

The Panel also remanded the Commission’s determination with respect to impact to further examine the issue of crop yields; specifically, the Panel ordered the Commission to “[p]rovide a new analysis of the impact of subject imports on the domestic industry, explaining and analyzing (a) how fluctuating yields may leave the domestic industry vulnerable as a result of price depression of the subject

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<sup>35</sup> Panel Report at 66-67.

<sup>36</sup> Affidavit of \*\*\*, attached to NAMA Post-Hearing Brief at Exhibit 1.

<sup>37</sup> Remand Staff Report at II-9.

<sup>38</sup> See Remand Staff Report at II-9.

<sup>39</sup> Original Staff Report at Table VII-2. The remaining shipments were sold in Canada or in third-country markets.

<sup>40</sup> The assertion of \*\*\* that it is supply generally, regardless of destination, that affects MGE prices is based on the erroneous assumption that all destination markets are fungible. It is not necessarily the case that HRS wheat diverted from one market could simply be moved to and absorbed by some other market. Transportation costs and other factors may make it infeasible or uneconomical to divert a particular volume of wheat from a closer market to a more distant one.

<sup>41</sup> This section addresses point 5 remanded by the Panel. Panel Report at 65-66.



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imports, (b) how yield fluctuations were accounted for, and (c) why yields per acre and farm prices are the most relevant factors in determining the financial state of the domestic industry.”<sup>42</sup>

Before I address the merits of this issue, I wish to note that it is not clear to me why the Panel took up the issue of yields since neither of the parties challenging the determination before the Panel raised any issue regarding the Commission’s analysis of yields. Rather, the parties’ arguments were focused on the treatment of post-petition information and the Commission’s findings of significant price effects, and only touched on impact to the extent that the Commission’s impact finding was based on its price effects findings. The U.S. statute governing review of Commission’s decisions by the Court of International Trade, into whose shoes a NAFTA panel steps in conducting its review, provides that “the decision of . . . the International Trade Commission is presumed to be correct [and that] [t]he burden of proving otherwise shall rest upon the party challenging such decision.”<sup>43</sup> In the absence of any proof (or even argument) offered by the challenging parties that the Commission’s analysis of yields was incorrect, there was no basis for the Panel to find that the presumption of correctness as to that issue had been overcome.

Turning to the substance of the issue, the Commission explained in its determination that yields – *i.e.*, bushels harvested per acre planted – is an important determinant of industry financial performance: “Prices and yields determine total product return (except for the much smaller contribution of loan deficiency payments).”<sup>44</sup> These return factors, along with per acre costs, determine per acre industry profitability.

As the Commission found in the original determination, yields fell during the period of investigation, from 37.0 bushels per acre in 2000/01, to 34.6 bushels per acre in 2001/02, and to 28.2 bushels per acre in 2002/03.<sup>45</sup> Because declining yields means lower industry revenue, I have considered the extent to which falling yields have adversely impacted the domestic industry. I have focused on the first two marketing years since, as discussed above, subject import patterns and price effects were affected in 2002/03 by the filing of the petition.

Between 2000/01 and 2001/02, yields fell from 37.0 bushels to acre to 34.6 bushels per acre, or by 6.4 percent. This change in yield, while significant, is not large compared to year-to-year fluctuations in yield experienced by farmers over the last 20 years.<sup>46</sup> Thus, it does not seem reasonable to ascribe to the yield decline the large deterioration in industry financial condition from 2000 to 2001 (the calendar years most closely corresponding to those two marketing years). As the Commission observed, farmers went from solid profits in 2000 to break-even levels or even losses in 2001.<sup>47</sup>

As a way to analyze the relative effects of yield changes as compared to changes in prices and costs, the Commission generated a variance analysis in these remand proceedings. This analysis shows that, for four of six farmer groups, the negative effect of lower prices far exceeded the negative effects of

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<sup>42</sup> Panel Report at 65-66.

<sup>43</sup> 19 U.S.C. § 2639(a)(1). In contrast to its decision to remand the issue of yields in the absence of party argument, the Panel took the correct approach with respect to the domestic like product finding, which the Panel declined to review because Complainants failed to pursue the argument in their briefs or at oral argument. Panel decision at 5 n.5.

<sup>44</sup> Commission Determination at 78.

<sup>45</sup> Original Staff Report at Table C-2.

<sup>46</sup> See Remand Staff Report at Table II-4 (annual yield changes varied, and often exceeded 10 percent).

<sup>47</sup> Commission Determination at 76.

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declining yields from 2000 to 2001.<sup>48</sup> In two of the six groups, yield effects were greater than price effects, but negative price effects were still significant.

In sum, I find that while declining yields had a negative effect on the domestic industry's performance in 2001/02, this effect does not diminish the effect of falling prices. As explained above and in the Commission's prior views, subject imports at underselling prices were a key factor contributing to lower market prices that injured the domestic HRS wheat industry.

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<sup>48</sup> Remand Staff Report at Appendix C (since the financial data is on a per-acre basis, yield corresponds to "Volume" in the appendix tables).